Nos. 14-1418, 14-1453, 14-1505, 15-35, 15-105, 15-119 & 15-191

Supreme Court, U.S.
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In The
Supreme Court of the United States

MOST REVEREND DAVID A. ZUBIK, et al.,

Petitioners,

v.

SYLVIA BURWELL, et al.,

Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Third, Fifth, Tenth, and D.C. Circuits

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF EVANGELICALS, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, THE ASSEMBLIES OF GOD, THE SISTERS OF ST. FRANCIS OF PERPETUAL ADORATION, AND COLORADO CHRISTIAN UNIVERSITY SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether the HHS contraceptive mandate and its "accommodation" violate the Religious Freedom Restoration Act (RFRA) by forcing some religious nonprofits to act in violation of their religious beliefs, all while the Government has failed to meet its burden of demonstrating that this compulsion is the least restrictive means of advancing a compelling interest.

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INTEREST OF *AMICI CURIAE*[1]

Amici are a diverse group of religious organizations concerned that the Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb *et seq.* (RFRA), be accurately interpreted and fully enforced. Some of these *amici* actively participated in the effort to enact RFRA in 1993 and to amend it in 2001. Individual statements by the *amici* are contained in the Appendix.

SUMMARY OF ARGUMENT

Religious freedom is secure only when fortified by legal standards that are both clear and consistently applied. Congress enacted RFRA to protect religious freedom by requiring the Government to satisfy the high demands of strict scrutiny whenever a law substantially burdens religious exercise. But RFRA's plain meaning is threatened by the Government's misplaced concern with third-party harm.

This brief responds to the Government's argument that RFRA does not protect religious exercise when doing so would impose a detriment, loss, or harm on third parties. The Government contends that

[1] The parties have consented to the filing of this brief and letters indicating their consent are on file with the Clerk. No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* and their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

RFRA does not require accommodation of petitioners' religious objections to facilitating contraceptive coverage because a religious exemption will make it more difficult for some of petitioners' employees to get such coverage.

The Government is mistaken. Making third-party harm a categorical bar on relief eviscerates RFRA. The statute already accounts for third-party harm – but as part of a structured balancing test, not as an absolute bar to relief. Nor does the Establishment Clause limit RFRA's vital protections. RFRA is a religious exemption. Without exception, such exemptions have been upheld by this Court as a valid means of lifting legal burdens on religion. Unless rejected, the Government's third-party-harm principle will undermine numerous federal and state laws providing religious exemptions in a wide variety of contexts.

If the Government prevails, churches and other religious organizations have much to lose. RFRA reflects Congress's determination that the exercise of religion warrants the highest level of protection known to federal law. But strict scrutiny would lose considerable force if allegations of third-party harm, no matter how mild, satisfy RFRA's least-restrictive-means test. RFRA would offer little protection for religious organizations, even against trivial governmental interests, if third-party harm were always enough to thwart a claim. It is the Government's attempt to dilute RFRA – not the issue of contraception – that lends this case broad significance. At stake

is whether RFRA will remain an effective bulwark of religious freedom.

The Government urges that petitioners' religious freedom under RFRA must yield to avoid placing even minor obstacles in the way of contraceptive coverage. Delivering contraceptive coverage through petitioners' health plans is non-negotiable, the Government says, because the unfamiliarity and inconvenience of other means would marginally reduce the number of women obtaining cost-free contraceptives. *See* Brief for the Respondents in Opposition [*hereinafter* Br. Res. Opp.] at 26-28, Zubik v. Burwell, Nos. 14-1418 & 15-191 (U.S. Aug. 20, 2015). Despite RFRA's plain language, the Government demands that petitioners' civil rights give way on "account of the burdens a requested accommodation may impose on nonbeneficiaries," no matter how slight those burdens may be. *Id.* at 28 (quotation omitted).

Only two terms ago this Court rejected another attempt to make third-party disadvantage an absolute bar on RFRA claims. It repudiated the notion that "any burden on religious exercise, no matter how onerous and no matter how readily the government interest could be achieved through alternative means, is permissible under RFRA so long as the relevant legal obligation requires the religious adherent to confer a benefit on third parties." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2781 n.37 (2014). The Court reasoned that "[n]othing in the text of RFRA or its basic purposes supports giving the Government an entirely free hand to impose burdens on

religious exercise so long as those burdens confer a benefit on other individuals." *Id.*

That ruling was correct and this Court should reaffirm it here. A rule deeming RFRA inapplicable whenever an exemption would disadvantage third parties finds no support in the plain language of RFRA or controlling precedents under the Establishment Clause. Indeed, making third-party harm a total bar on religious accommodation would create serious tensions with the First Amendment's prohibition on civil courts taking up religious questions.

RFRA is a federal civil rights law enacted to protect the exercise of religion as one of the Nation's highest values. The Government's allegations of third-party harm should not categorically bar relief from federal laws that substantially burden religion. Rejecting the Government's argument is necessary to preserve RFRA as a meaningful defense of religious freedom.

ARGUMENT

I. RFRA Accounts for Harms to Third Parties Through Its Balancing Test, Not a Categorical Rule.

Petitioners have shown that the challenged regulations substantially burden their exercise of religion by forcing them, under penalty of substantial fines, to

cooperate in a regulatory scheme that (according to their faith) implicates them in grave sin.[2] Their answer to the problem of complicity – a "difficult and important question of religion and moral philosophy," *Hobby Lobby*, 134 S. Ct. at 2778 – commands respect. RFRA guarantees freedom for all sincere forms of religious exercise, not just for those practices that appear sensible to others. Before trivializing petitioners' objections, as some lower courts have done, it should be remembered that "Thomas More went to the scaffold rather than sign a little paper for the King." *E. Texas Baptist Univ. v. Burwell*, 807 F.3d 630, 635 (5th Cir. 2015) (Jones, J., dissenting from the denial of reh'g en banc).

Because the challenged regulations impose a substantial burden on petitioners' religious exercise, RFRA then requires the Government to show that "application of the burden to the [petitioners] (1) is in furtherance of a compelling governmental interest and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1(b). *Amici* focus in this brief on the Government's attempt to circumvent or neuter the "least restrictive means" prong of the compelling interest test.

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[2] Although *amici* dispute the Government's authority to second-guess how severely HHS regulations interfere with petitioners' religious exercise, we leave to petitioners the task of addressing the proper application of the "substantial burden" test.

The Government acknowledges that its regulations aim to deliver contraceptive coverage from within a religious employer's "insurance coverage network" using that employer's "coverage administration infrastructure." 80 Fed. Reg. 41,318, 41,328 (July 14, 2015). Yet the Government summarily rejects any "alternative approaches" for religious nonprofits to comply with the contraceptive mandate on the grounds that they are "'not feasible and/or would not advance the government's compelling interests as effectively'" as facilitating contraceptive benefits through petitioners' own health plans or Third Party Administrators. Br. Res. Opp. at 25, *Zubik*, Nos. 14-1418 & 15-191 (quoting 78 Fed. Reg. 39,870, 39,888 (July 2, 2013)). The challenged regulations are allegedly necessary to "'[p]rovid[e] contraceptive services seamlessly together with other health services, without cost sharing or additional administrative or logistical burdens and within a system familiar to women.'" *Id.* at 28 (quoting *Priests for Life v. United States Dep't of Health & Human Servs.*, 772 F.3d 229, 265 (D.C. Cir. 2014)). Any other approach, we are told, would "'[i]mpos[e] additional barriers to women receiving the intended coverage by requiring them to take steps to learn about, and to sign up for, a new health benefit, would make that coverage accessible to fewer women.'" *Id.* (quoting 78 Fed. Reg. at 39,888).[3]

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[3] Some courts of appeals have mistakenly endorsed the Government's position. *See Priests for Life*, 772 F.3d at 245 (distinguishing *Hobby Lobby* because "[t]he relief Plaintiffs seek

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Third-party harm is thus proffered as a sufficient reason for denying petitioners a true accommodation from the contraceptive mandate. By the Government's account, the prospect that someone will be worse off if RFRA is enforced satisfies the least-restrictive-means test. Third-party harm is cited not to satisfy that test, but to dodge it. Other means of achieving the Government's regulatory aims without burdening petitioners' religious exercise are simply unexplored. Never explained, for instance, is why the same health benefits exchanges that serve tens of millions of employees at Congress's direction would not also suffice for petitioners' employees. In effect, the Government proposes to withhold relief under RFRA solely based on third-party harm, however mild.

That is not the law. Nor should it be.

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here would either deny the contraceptive coverage altogether or, at a minimum, make the coverage no longer seamless from the beneficiaries' perspective"); *Univ. of Notre Dame v. Burwell*, 786 F.3d 606, 616 (7th Cir. 2015) ("But because it's a bother for a person to shop for the 'best' contraceptive coverage, the proposed solution would reduce the number of women with such coverage, compared to their being entitled to such coverage automatically by virtue of being Notre Dame students or employees.").

A. *Hobby Lobby* rejected the contention that RFRA withholds protection whenever a religious accommodation adversely affects others.

Hobby Lobby largely controls this case. There, the Court rejected the Government's proposed categorical rule that an exemption is not allowed under RFRA when it would disadvantage third parties: "Nothing in the text of RFRA or its basic purposes supports giving the Government an entirely free hand to impose burdens on religious exercise so long as those burdens confer a benefit on other individuals." *Hobby Lobby*, 134 S. Ct. at 2781 n.37. In the words of the principal dissent, the majority held that "disadvantages that religion-based opt-outs impose on others[ ] hold no sway , at least when there is a 'less restrictive alternative.'" *Id.* at 2787 (Ginsburg J., dissenting).

Notwithstanding *Hobby Lobby*, the Government insists that petitioners' RFRA claims should be denied because delivering free contraceptives other than through a woman's employee health plan would have a "'detrimental effect'" on female employees and beneficiaries, unlike the remedy in *Hobby Lobby* that had "'precisely zero'" effect on beneficiaries. Br. Res. Opp. at 26, *Zubik*, Nos. 14-1418 & 15-191 (quoting *Hobby Lobby*, 134 S. Ct. at 2781 n.37, 2760).[4] *Hobby Lobby*

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[4] The Government gets no mileage from Justice Kennedy's observation that the exercise of religion should not "unduly restrict other persons in protecting their own interests. "

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plainly rejected the Government's proposed rule, and there is no reason to revisit that determination. Granting relief under RFRA only when an exemption or accommodation would have "precisely zero" effect on putative beneficiaries or other parties would punch a gaping hole in this vital civil rights law.

B. RFRA's compelling interest test already accounts for third-party harm.

Third-party harm is relevant when applying RFRA, but the statute accounts for it in a structured balancing test rather than as a categorical bar. *Hobby Lobby* explained that third-party harms do not automatically preclude relief:

> It is certainly true that in applying RFRA "courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." That consideration will often inform the analysis of the Government's compelling interest and the availability of a less restrictive means of advancing that interest. But it could not reasonably be maintained that any burden on

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Hobby Lobby, 134 S. Ct. at 2787 (Kennedy, J., concurring). He hastened to stress the need "to reconcile these two priorities" of religious freedom and access to contraception. *Id.* And Justice Kennedy never intimated that the accommodation approved in *Hobby Lobby* was the only valid means of reconciliation or that RFRA would "unduly restrict other persons" if the government were required to make contraceptives available through a program other than existing employee health plans. *Id.*

> religious exercise, no matter how onerous and no matter how readily the governmental interest could be achieved through alternative means, is permissible under RFRA so long as the relevant legal obligation requires the religious adherent to confer a benefit on third parties.

Id. at 2781 n.37 (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005) (applying RLUIPA)); *see Little Sisters of the Poor v. Burwell*, 794 F.3d 1115, 1195 n.50 (10th Cir. 2015) (holding that "the rights and interests of third parties are properly weighed" under RFRA's "strict scrutiny" analysis).

RFRA is written to prevent the Government from running roughshod over the exercise of religion even when the challenged regulation confers entitlements on third parties. *Hobby Lobby*, 134 S. Ct. at 2781 n.37 Regulations that confer entitlements or other benefits on a discrete class of recipients are subject to RFRA's strict scrutiny standard no less than any other category of laws. The statute's structured balancing test thus already accounts for potential effects on beneficiaries.

C. The Government's third-party-harm argument collapses RFRA's "least restrictive means" and "compelling interest" tests into a single inquiry.

The Government's third-party-harm argument misreads RFRA. Its text leaves no doubt that when a law imposes a substantial burden on religion, "the

burden is placed squarely on the Government," to show that "the compelling interest test is satisfied through application of the challenged law 'to the person' – the particular claimant whose sincere exercise of religion is being substantially burdened." *Gonzales v. O Centro Espirita Beneficente União Do Vegetal*, 546 U.S. 418, 430-31 (2006) (citing 42 U.S.C. § 2000bb-1(b)). The Government does not escape that burden by showing that the challenged law confers a benefit or entitlement on a third party. Under the "focused inquiry" that RFRA requires, "the Government's mere invocation" of a claimed interest "cannot carry the day." *Id.* at 432. Instead, courts "'must searchingly examine the interests that the State seeks to promote.'" *Id.* at 431 (quoting *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972)).

Hobby Lobby assumed for the sake of argument that the Government has a compelling interest in "guaranteeing cost-free access" to the full range of FDA-approved contraceptive methods. 134 S. Ct. at 2780. Although we do not address that assumption in this brief, the record below leaves no doubt that the Government has failed to demonstrate a compelling interest in using the health plans of religious employers as the sole available means of advancing its interest. Nor could it. There is no "compelling interest in each marginal percentage point by which [the Government's] goals are advanced." *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2741 n.9 (2011).

Yet the Government's stated interest in providing contraceptive coverage "'seamlessly together with

other health services, without cost sharing or additional administrative or logistical burdens and within a system familiar to women,'" Br. Res. Opp. at 28, *Zubik*, Nos. 14-1418 & 15-191 (quoting *Priests for Life*, 772 F.3d at 265), amounts to the audacious claim that the Government has a compelling interest in providing *burden-free* access to contraceptive services. Thus, the Government baldly declares a compelling interest in its policy objective (cost-free contraception) *and* in the means it has chosen to pursue it (religious employers' insurance).

This Court repudiated a similarly brazen claim in *O Centro*, where the government asserted "a compelling interest in the *uniform* application of the Controlled Substances Act, such that no exception to the ban on the use of the hallucinogen can be made to accommodate the sect's sincere religious practice." *O Centro*, 546 U.S. at 423. Likewise, here, the Government asserts a compelling interest in the "seamless" delivery of contraceptive insurance and argues that any exemption would undermine that interest. It dismisses available alternatives with the untenable excuse that making that coverage available outside of petitioners' health plans would defeat the Government's interests.

Intransigence toward individualized exceptions runs headlong into RFRA's least-restrictive-means requirement. This "exceptionally demanding" test, *Hobby Lobby*, 134 S. Ct. at 2780, obligates the Government to demonstrate that "it lacks other means of achieving its desired goal without imposing a

substantial burden on the exercise of religion by the objecting parties." *Id.* By effectively demanding that this Court assume not only a compelling interest in its *ends* (as in *Hobby Lobby*) but also in its *means*, the Government collapses the compelling-interest and least-restrictive prongs of strict scrutiny into a one-criterion standard. Then the Government cites incidental inconveniences – the need "to take steps to learn about, and to sign up for, a new health benefit," 78 Fed. Reg. at 39,888, "even minor added steps," *Priests for Life*, 772 F.3d at 265, or simply the "bother" of "shop[ping] for the 'best' contraceptive coverage," *Univ. of Notre Dame*, 786 F.3d at 616 – as sufficient to override petitioners' religious exercise. Evaded is RFRA's searching inquiry into the feasibility of alternatives and the government's proffered reasons for rejecting them.

So ends RFRA's command to apply "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). Reliance on third-party harm as an absolute bar to RFRA claims, if adopted, could not be limited to RFRA. It would inevitably "water[] down" strict scrutiny in a way that "would subvert its rigor in other fields where it is applied." *Employment Div. v. Smith*, 494 U.S. 872, 888 (1990). If avoiding harm to third parties always satisfies strict scrutiny, freedom of speech would no longer protect speakers who injure others – especially, one imagines, where harm is inflicted deliberately. *But see Snyder v. Phelps*, 562 U.S. 443, 458-61 (2011) (anti-LGBT demonstration near serviceperson's

funeral protected); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) (defamatory speech protected); *Ashcroft v. ACLU*, 542 U.S. 656 (2004) (declining to relax strict scrutiny when the government seeks to protect children from harmful speech). Third-party harm cannot be erected as an impenetrable shield against RFRA claims without seriously undermining the same compelling interest test that protects freedom of speech and other essential rights. Maintaining the integrity of the compelling interest test requires that "RFRA challenges should be adjudicated in the same manner as constitutionally mandated applications of the test." *O Centro*, 546 U.S. at 430.

D. Allowing third-party harms to excuse the Government from demonstrating a compelling interest demotes the value placed on the exercise of religion.

The Government's third-party-harm rule also falters by placing a lower value on religious exercise than on unmodified access to a new public entitlement. RFRA requires the reverse.

RFRA places religious freedom above other governmental interests when a law substantially burdens religious exercise. "The *only* exception requires the Government to satisfy the compelling interest test. " *O Centro*, 546 U.S. at 424. The Government's no-third-party-burden argument improperly reduces the value that RFRA places on religious exercise. In a society as interconnected as

ours, where no person is an island and where government is constantly adjusting the benefits and burdens of modern life, nearly every religious exemption or accommodation can be said to impose some burden on someone. If that were enough to defeat a RFRA claim, then RFRA would be meaningless. This is surely not what Congress intended in fashioning RFRA's "very broad protection for religious liberty." *Hobby Lobby*, 134 S. Ct. at 2767

Making third-party harm a categorical bar on otherwise valid claims for a religious exemption undermines the whole point of RFRA – which was to elevate religious exercise to the heights that Congress understood it to occupy before *Smith*. In this case, the Government's asserted third-party harm centers on the legitimate interests of petitioners' employees. But if a RFRA claim can be defeated simply by identifying someone who will be worse off if it succeeds, there will be incentive to concoct trivial harms. Congress could not have intended rights protected by RFRA to be so readily thwarted.

II. The Establishment Clause Is Not Violated by Laws Like RFRA That Lift Regulatory Mandates from Religion, Even If They Harm Third Parties.

Lurking behind the Government's categorical bar is a constitutional argument expressed by the principal dissent in *Hobby Lobby*. Justice Ginsburg contended that "the government's license to grant

religion-based exemptions from generally applicable laws is constrained by the Establishment Clause." 134 S. Ct. at 2802 n.25 (citation omitted). Warming to this theme, she wrote that "one person's right to free exercise must be kept in harmony with the rights of her fellow citizens, and 'some religious practices [must] yield to the common good.'" *Id.* (quoting *United States v. Lee*, 455 U.S. 252, 259 (1982)).[5]

Unobjectionable as these principles might be in some settings, here they mistakenly suggest that applying RFRA somehow transgresses the Establishment Clause. Not so. An unbroken line of six Establishment Clause precedents in this Court confirms that government may exempt religious believers and religious organizations from laws and regulations. Petitioners' RFRA claims are consistent with that long-settled principle.

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[5] A concern with third-party harm likewise prompted Justice Ginsburg to register a separate concurrence to explain why she supported the right of a prisoner to obtain a religious exemption from a prison rule banning beards: "Unlike the exemption this Court approved in *Burwell* accommodating petitioner's religious belief in this case would not detrimentally affect others who do not share petitioner's belief." *Holt v. Hobbs*, 135 S. Ct. 853, 867 (2015) (Ginsburg, J., concurring).

A. *Amos* and five other precedents correctly hold that the Establishment Clause allows a lawmaker to lift statutory burdens from religious organizations.

Six decisions of this Court hold that when a general regulatory or tax law imposes a burden on a religious belief or practice, lawmakers may lift that burden without violating the Establishment Clause. *See Corp. of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987) (holding that the religious exemption for employers in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (Title VII), does not violate the Establishment Clause); *Cutter*, 544 U.S. at 709 (holding that Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc (RLUIPA), does not violate Establishment Clause); *Gillette v. United States*, 401 U.S. 437 (1971) (upholding religious exemption from military draft for those opposing all war); *Walz v. Tax Comm'n*, 397 U.S. 664, 664 (1970) (sustaining property tax exemptions for religious organizations); *Zorach v. Clauson*, 343 U.S. 306 (1952) (affirming validity of local public school policy enabling pupils voluntarily to attend religion classes away from school grounds); *The Selective Draft Law Cases*, 245 U.S. 366 (1918) (upholding military draft exemption for clergy, seminarians, and pacifists).

Exempting religious practice from generally applicable laws has the net effect of leaving religion alone. And for the government to leave religion alone is not to establish a religion. For there is "room for play in the joints" between the Religion Clauses, *Walz*, 397 U.S. at 669, within which "government may

(and sometimes must) accommodate religious practices without violating the Establishment Clause." *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 144-45 (1987).

This Court's precedents establish that lawmakers may enact religious exemptions but not unyielding religious preferences. A religious exemption is when government lifts a burden of its own making on religious beliefs or practices. A religious preference is when government gives religion a naked advantage that it would not have had without legislative assistance. *See* Carl H. Esbeck, *Third-Party Harms, Congressional Statutes Accommodating Religion, and the Establishment Clause* (Univ. of Mo. Sch. of Law Legal Studies Paper Series, Research Paper No. 2015-10), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2607277; *see also Madison v. Riter*, 355 F.3d 310, 320-21 (4th Cir. 2003) (explaining that RLUIPA is a valid legislative effort to lift "government-imposed burdens on religious exercise").

A religious exemption rests on the "proper purpose" or a "permissible legislative purpose" of seeking "to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Amos*, 483 U.S. at 335. Moreover, when such a law "lift[s] a regulation that burdens the exercise of religion," it is unnecessary for "the exemption [to] come packaged with benefits to secular entities." *Id.* at 338.

The leading decision on religious exemptions is *Amos*, which upheld a statutory exemption, 42 U.S.C. § 2000e-1(a), which excuses religious employers from Title VII's prohibition on religious discrimination in employment. *Amos*, 483 U.S. at 331-33. The controversy in *Amos* arose when a building custodian employed at a gymnasium operated by The Church of Jesus Christ of Latter-day Saints was discharged for ceasing to be a church member in good standing. The Title VII exemption, however, was not an instance of government "abandoning neutrality" to enact a religious preference: "it [wa]s a permissible legislative purpose to alleviate" a general regulatory burden, thereby leaving religious organizations free "to define and carry out their religious missions" as they see fit. *Id.*

Establishment Clause attacks on federal statutes dictating religious exemptions have uniformly failed. RLUIPA withstood a facial challenge in *Cutter*, where it was held to be consistent with the First Amendment for two independent reasons. The "[f]oremost" reason for finding the institutionalized-persons component of RLUIPA valid was that "it alleviates exceptional government-created burdens on private religious exercise." *Cutter*, 544 U.S. at 720. It survived Establishment Clause scrutiny as well because under RLUIPA "courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries and they must be satisfied that the Act's prescriptions will be administered neutrally among different faiths." *Id.* (citations and

footnote omitted). Because RLUIPA was not "unyielding" toward third-party harms, a unanimous Court upheld its constitutionality.

RFRA employs "the same standard" as RLUIPA – a standard held in *Cutter* not to "violate the Establishment Clause." *O Centro*, 546 U.S. at 436 (citing *Cutter*, 544 U.S. at 709). *Cutter* and *O Centro* stressed "the feasibility of case-by-case consideration of religious exemptions to generally applicable rules." *Id.* Both decisions thus confirmed that courts are "up to the task" of applying "the compelling interest test 'in an appropriately balanced way' to specific claims for exemptions as they ar[i]se." *Id.* (quoting *Cutter*, 544 U.S. at 710).

More than that, the Free Exercise Clause encourages discretionary accommodations like RFRA. For "a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well." *Smith*, 494 U.S. at 890. RFRA manifests exactly what *Smith* invited – Congress's solicitude toward the free exercise of religion.

B. Religious exemptions should not be confused with religious preferences.

Treating third-party harm as a constitutional bar on religious exemptions misreads *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985). *Caldor* arose from a Connecticut statute, which provided that "[n]o person who states that a particular day of the week is

observed as his Sabbath may be required by his employer to work on such day." *Id.* at 706. Obviously, no such right existed before the statute became law. Thornton was a department store employee who observed Sunday as his Sabbath, so he requested Sundays off and invoked the Connecticut statute. The store refused his request and challenged the statute under the Establishment Clause. *Id.* at 707, 710-11.

The Court struck down the statute, noting that it "arms Sabbath observers with an absolute and unqualified right not to work on whatever day they designated as their Sabbath." *Id.* at 709 (footnote omitted). In rigidly altering common-law contract rights, which had long afforded substantial flexibility to employers to manage their workplaces to respond to employee and market needs, the Connecticut statute failed to account for how an employer could respond "if a high percentage of an employer's workforce asserts rights to the same Sabbath." *Id.* Rather, the law granted an "unyielding weighting in favor of Sabbath observers over all other interests." *Id.* at 710. Sabbath observers would always prevail over coworkers with more seniority wanting weekends off, perhaps, to join a spouse or to be with children at home. *Id.* at 710 n.9. All this was problematic "[u]nder the Religion Clauses," the Court reasoned, because of the basic principle that "government must take pains not to compel people to act in the name of any religion." *Id.* at 708. It was the prospect of government compulsion – not increased business expense – that prompted the Court's concern. The

Connecticut law violated the Establishment Clause by compelling employers to assist employees like Thornton in their Sabbath observance.

Caldor struck down a religious preference, whereas *Amos* affirmed a religious exemption. Thornton's religious burden was not caused by a new legal mandate but by the demands of private employment. Connecticut lawmakers empowered Thornton and others like him to force others to help ensure the availability of Sabbath observance. *Id.* at 709. Unlike the exemption in *Amos*, which lifted a *governmental* burden on religious practice, the preference in *Caldor* lifted a *private* market burden on some religious employees by shifting a burden to employers and other employees. Effectively, Connecticut intervened on the side of a private religious practice, placing that value above all other interests. Such unadorned favoritism transgresses the Establishment Clause.

This blatant religious preference explains why Caldor said that "a fundamental principle of the Religion Clauses" is that the First Amendment "gives no one the right to insist that in pursuit of their own interests others must conform their conduct to his own religious necessities." *Id.* at 710 (citations and quotations omitted). Read in isolation, this remark might appear to be a broad restriction on the validity of religious exemptions. But the Court has since clarified its meaning. *See Hobbie*, 480 U.S. at 145 n.11 (distinguishing *Caldor* because giving unemployment benefits to people who quit work over a religious conflict does not give them "an absolute right" or place

"an unacceptable burden on employers and coworkers" by failing to include "exceptions for special circumstances"); *Amos*, 483 U.S. at 337 n.15 (distinguishing *Caldor* because "it was the Church and not the Government, who put [the employee] to the choice of changing his religious practices or losing his job" and because the challenged exemption did not invest the employer's religious standards with "the force of law").

Another religious preference was before the Court in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977). In *Hardison* an airline clerk requested time off on Saturdays to observe his Sabbath. When his request was denied because of a union-based seniority system, he refused to report to work on Saturdays and was fired. *Id.* at 66-67 He brought suit against the airline alleging that it had violated a Title VII provision requiring employers to make "reasonable accommodations" to their employees' religious needs unless it would impose an "undue hardship." 42 U.S.C. § 2000e(j).[6] As in *Caldor*, the Court was concerned that the requested exemption would "require an employer to discriminate against some employees in order to enable others to observe their Sabbath." *Hardison*, 432 U.S. at 85. To avoid that possibility,

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[6] Different provisions of Title VII were at issue in *Hardison* and *Amos*. The former involved a statutory preference favoring religious employees, 42 U.S.C. § 2000e(j), while the latter involved a statutory exemption for religious employers, 42 U.S.C. §§ 2000e-1(a), 2000e-2(e)(2).

the Court adopted one of several possible constructions of "undue hardship" – the now-familiar "de minimis" standard that affords maximum flexibility to employers – which obviated the need to determine whether a stronger accommodation requirement would violate the Establishment Clause. *See id.* at 89 (Marshall, J., dissenting). But while the precise limits of statutory accommodations for religion in the workplace are unclear, *Amos* denies that religious exemptions must impose no more than *de minimis* burdens on third parties. *Amos* itself contradicted that notion by affirming the authority of a church to terminate employment for purely religious reasons.

Religious preferences are uncommon – but there are a few instances of them besides *Caldor* and *Hardison*. *Torcaso v. Watkins*, 367 U.S. 488 (1961), set aside a Maryland constitutional provision requiring public office holders to declare a belief in God. *Id.* at 495-96. Maryland offered no alternatives, such as an affirmation or a profession of strict fidelity to the law. Requiring the notary to profess a belief in God reflected government taking the side of religion on the controverted issue of who can be trusted to hold public office. Also, *Larkin v. Grendel's Den*, 459 U.S. 116 (1982) overturned a Massachusetts law that handed churches a veto over the issuance of a liquor license to businesses situated within a 500-foot radius of the church. Legitimate concerns about the location of businesses with liquor licenses may be answered with a flat ban within a certain proximity of a church or an entitlement for religious organizations, along

with other affected entities, to receive a hearing where their concerns "would be entitled to substantial weight." *Id.* at 124. But the state could not delegate a "unilateral and absolute power" for a church to deny a liquor license. *Id.* at 127.

Caldor stands alongside *Hardison*, *Torcaso*, and *Larkin*, just as *Amos* stands with *Cutter*, *Gillette*, *Walz*, *Zorach*, and *The Selective Draft Law Cases*. Religious preferences like the statute in *Caldor* that betray an "unyielding" preference for a religious belief or observance particular to some religions violate the Establishment Clause. Religious preferences exhibit the lawmaker's attempt to fortify religion against privately created conflicts by arming a religious believer or institution with the power to compel others in the private sphere to aid religious practice. These features set apart a religious *preference* from a religious *exemption*. *Amos* and other exemption decisions affirm the validity of laws that lift government-imposed burdens on religious practice. What distinguishes a religious exemption from a religious preference is the source of the burden on religious practice. *See Hobbie*, 480 U.S. at 145 n.11; *Amos*, 438 U.S. at 337 n.15.

RFRA falls in the category of religious exemptions. Its central requirement is for courts to apply "the compelling interest test 'in an appropriately balanced way' to specific claims for exemptions as they ar[i]se." *O Centro*, 546 U.S. at 436 (quotation omitted). But there remains the question of where to

draw the baseline identifying when a burden on religious exercise originates.

C. Burdens on religion are measured under the Establishment Clause by the *status quo ante* – before the legal mandate is first imposed.

Amos conclusively answers this baseline question. It rejected the view that "the Church's ability to propagate its religious doctrine is any greater now than it was prior to the passage of the Civil Rights Act in 1964." 483 U.S. at 337. And it reasoned that an exemption for religious employers could not be "fairly attributed to the Government, as opposed to the Church." *Id.* (footnote omitted). Given the pre-1964 baseline used in *Amos*, the 1972 amendment expanding the scope of the exemption, *id.* at 332 n.9, was not a new "benefit" but merely returned the church to the unregulated status it enjoyed under the common law before federal law prohibited religious discrimination in employment. *Amos* thus holds that the baseline lies where the law first interferes with religious practice. The test is whether an exemption lifting that burden increases the capacity of a religious person or organization "to propagate its religious doctrine" or otherwise practice religion relative to the law that existed "prior to the passage" of the legal mandate that interfered with religion. *Id.*

Amos nowhere suggests that the baseline is measured by which statute – the exemption or the

mandate – is enacted first. It drew the baseline at the enactment of the 1964 Civil Rights Act, when the law first interfered with religious practice. *Hobby Lobby* did the same. Granting the RFRA exemption returned employers and employees to the *status quo ante*, their respective positions before the HHS contraception mandate was binding. Before the Affordable Care Act, *see* 42 U.S.C. § 300gg-13(a)(4), Hobby Lobby and other employers with similar religious objections toward emergency contraceptives could provide employee health care without including such contraceptives. Exempting Hobby Lobby under RFRA lifts a mandate created by the HHS regulations. *Amos*, *Cutter*, and the other religious exemption decisions instruct that leaving religion alone does not establish religion.

Fixing the baseline at the right place illuminates whether a law qualifies as a valid religious exemption. *Amos* and other religious exemption decisions emphasize that removing an earlier-imposed legal mandate from a religious organization does not establish religion. But that does not mean that the exemption had no effect on others. Consider *Amos*. Exempting religious organizations from a general ban on employment discrimination allowed the church to dismiss a building custodian for falling short of the church's standards. By necessity, the religious exemption denied employment protections that would have protected the employee.

Compared with loss of employment in *Amos*, the third-party harm projected by the Government here

is minor. We are told that "'[i]mposing additional barriers to women receiving the intended coverage by requiring them to take steps to learn about, and to sign up for, a new health benefit, would make that coverage accessible to fewer women.'" Br. Res. Opp. at 28, *Zubik*, Nos. 14-1418 & 15-191 (quoting 78 Fed. Reg. at 39,888). As we understand it, granting petitioners relief will not deprive their employees of contraception, though it may require employees to obtain it outside of their health plans. However inconvenient or burdensome, the resulting harm is surely less than the loss of employment as in *Amos*.

Third-party harm is too malleable a concept to operate as a categorical bar on the exercise of religion. Although "religious believers have no constitutional right to inflict significant harm on nonconsenting others," not all detriments qualify as bona fide harms. Douglas Laycock, *Syllabus of Errors*, 107 MICH. L. REV. 1169, 1171 (2007). "[W]e live in a crowded society, where routine activities both inconvenience those around us and impose significant risks" and "[w]e also have an expansive capacity to define as harmful anything we don't like." *Id.* Freedom of religion assuredly does not include the unqualified right to impose burdens on third parties that the common law and our legal traditions have long considered harm, such as injuries to person, property, or reputation. But, as petitioners explain, "there is a sharp difference between preventing a religious group from inflicting harm and coercing it to provide benefits." Brief for Petitioners in Nos. 14-1418, 1453 & 14-1505, at 53, *Zubik* (U.S. Jan. 4,

2016). Confirming that distinction is RFRA itself, which embodies Congress's judgment that religious exercise holds paramount importance – more than unobstructed access to a new federal health program.

No religious exemption has ever failed scrutiny under the Establishment Clause. Although unyielding religious preferences are forbidden, *Caldor*, 472 U.S. at 710; *Larkin*, 459 U.S. at 127, *Amos* and five other precedents confirm that religious exemptions like RFRA are perfectly valid – even when they result in third-party burdens.

D. Petitioners' RFRA claims no more conflict with the Establishment Clause than did the religious accommodation upheld in *Hobby Lobby*.

Amos and other precedents confirm that religious exemptions do not offend the Establishment Clause. *Hobby Lobby* specifically extended that principle to the Affordable Care Act, holding that RFRA entitled closely held for-profit corporations to an exemption from the contraceptive mandate without pausing to consider whether applying RFRA runs up against Establishment Clause barriers. 134 S. Ct. at 2785. No such barriers should impede petitioners' RFRA claim for relief from the same contraceptive mandate.

Yet, in essence, the Government insists that petitioners are greedy, "contending that even more is required" than what *Hobby Lobby* endorsed. Br. Res. Opp. at 26, *Zubik*, Nos. 14-1418 & 15-191. Petitioners

are chided for "seek[ing] to invalidate the very regulatory accommodation that *Hobby Lobby* identified." *Id.*

This critique falls short. *Hobby Lobby* acknowledged that the exemption approved there might not "compl[y] with RFRA for purposes of all religious claims." 134 S. Ct. at 2782 (footnote omitted). Regulatory adjustments that accommodate one person's religious practice may not accommodate another, and RFRA requires individualized exemptions – not blanket ones. 42 U.S.C. § 2000bb-1(c). Nothing in RFRA obligates petitioners to accept a regulatory exemption devised for others.

The prospect of third-party harm "simply does not provide a categorical answer that relieves the Government of this obligation to shoulder its burden under RFRA." *O Centro*, 546 U.S. at 432. The Government is obligated to devise accommodations individually. Shorn of its constitutional pretensions, the Government's position is that petitioners' RFRA claim should yield because requiring their female employees and beneficiaries "'to take steps to learn about, and to sign up for, a new health benefit, would make that coverage accessible to fewer women.'" Br. Res. Opp. at 28, *Zubik*, Nos. 14-1418 & 15-191 (quoting 78 Fed. Reg. at 39,888). That is not the law. Congress's value judgment is that "[g]overnment shall not substantially burden a person's exercise of religion." 42 U.S.C. § 2000bb-1(a). It has not placed the same high value on "'[p]roviding contraceptive services seamlessly together with other health services, without

cost sharing or additional administrative or logistical burdens and within a system familiar to women.'" Br. Res. Opp. at 28, *Zubik*, Nos. 14-1418 & 15-191. If these values are to be placed on the scales, the text of RFRA – and the constitutional text, history, and national traditions standing behind it – means that religious freedom ought to prevail over "seamless" or burden-free access to a new federal benefit.

But zero sum contests are unnecessary. *Hobby Lobby* recognized that the employees of religious organizations need not suffer any real detriment because "the Government can readily arrange for other methods of providing contraceptives, without cost sharing, to employees who are unable to obtain them under their health-insurance plans due to their employers' religious objections." *Hobby Lobby*, 134 S. Ct. at 2781 n.37. HHS stiff-arms that easy solution in this case by its unwillingness to consider *any* alternative arrangements for religious nonprofits like petitioners. In that rigidity, not in RFRA, lies the real problem.

Whatever else, the Government's categorical third-party rule is not dictated by the Establishment Clause. *Amos*, *Cutter*, *O Centro* and other religious exemption decisions underscore the validity of legislative efforts to adjust legal requirements to individual religious commitments. And nothing distinctive about petitioners' RFRA claims condemns them as facially unreasonable. It is the Government – not petitioners – that itches to replace RFRA's command to "strike sensible balances," *O Centro*, 546 U.S. at 439,

with a sweeping rule that would deny religious exemptions on a bare showing that someone else might be worse off if religion is accommodated.

E. Legislative exemptions for religious exercise bear no resemblance to an established church.

Some critics go so far as to argue that RFRA resembles "the prototypical established church" by "forcing those who do not belong to a religion to bear the material costs of practicing it." Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343, 363 (2014); *see* Micah Schwartzman, Richard Schragger, and Nelson Tebbe, *The Establishment Clause and the Contraception Mandate*, Balkinization, Nov. 27, 2013, http://balkin.blogspot.com/2013/11/the-establishment-clause-and.html (concluding that, with regard to the application of RFRA in *Hobby Lobby*, "[i]f those exemptions impose substantial burdens on employees, then courts must reject them as violations of the Establishment Clause").

Not so. RFRA and other religious exemptions are nothing like an established church. Establishment Clause jurisprudence takes its bearings from "'historical practices and understandings.'" *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1819 (2014) (quoting *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 670 (1989)

(Kennedy, J., concurring in the judgment in part and dissenting in part)). Of special importance are the attributes of "the established church as it had been known in England and in most of the Colonies." *McGowan v. Maryland*, 366 U.S. 420, 465 (1961) (Frankfurter, J., separate op.). History records that the chief attributes of an established church were "coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*." *Lee v. Weisman*, 505 U.S. 577, 640 (1992) (Scalia, J., dissenting) (emphasis added). Established churches exercised coercion through "(1) control over doctrine, governance, and personnel of the church; (2) compulsory church attendance; (3) financial support; (4) prohibitions on worship in dissenting churches; (5) use of church institutions for public functions; and (6) restriction of political participation to members of the established church." Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I; Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2131 (2003); *accord Walz*, 397 U.S. at 668 ("To the men who wrote the Religion Clauses of the First Amendment, the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity.").

Religious exemptions were historically a protection against the oppressive coercion of established churches. *See* Douglas Laycock, *Regulatory Exemptions of Religious Behavior and the Original Understanding of the Establishment Clause*, 81 NOTRE DAME L. REV. 1793, 1796 (2006). "The established church

had no need for exemptions, because its teachings were in accord with government policy. Exemptions protect minority religions, and they emerged only in the wake of toleration of dissenting worship." *Id.* Exempting religious colleges, sacred orders, and theological seminaries from the strictures of modern regulation is worlds apart from Madison's fight against taxes to support ministers. *See* James Madison, *Memorial and Remonstrance Against Religious Assessments*, *in* JAMES MADISON: WRITINGS 29 (Jack N. Rakove ed., 1999). RFRA embodies sensitivity toward minority or unpopular viewpoints – not a regime of authoritarian coercion.

III. An Establishment Clause Rule Against Third-Party Harm Would Nullify Other Exemptions that Accommodate Religious Exercise.

Finally, the Government's insistence on treating third-party harm as a categorical bar on religious exemptions is a principle with no logical stopping point. Virtually any religious exemption excuses a religious believer or organization from complying with a law enacted to benefit someone. If the mere loss of that benefit is enough to defeat a claim for religious exemption, few religious exemptions would survive.

Petitioners' claims under RFRA would summarily fail. Any "minor added steps," *Priests for Life*, 772 F.3d at 265, of obtaining contraceptives through some program outside of employee health plans – on the health benefits exchange, for instance – would, by the

Government's reasoning, discourage at least employees from receiving covered contraception. And the prospect of that loss, however minor or unintended, would be sufficient to defeat petitioners' RFRA claims.

The force of that logic is sweeping. Once unleashed, the Government's third-party-harm rule will not be confined to RFRA – especially if the test of validity under the Establishment Clause becomes whether a religious exemption would "detrimentally affect others who do not share [the claimant's] belief." *Holt*, 135 S. Ct. at 867 (Ginsburg, J., concurring); *accord Hobby Lobby*, 134 S. Ct. at 2802 n.25 (Ginsburg, J., dissenting) ("[T]he government's license to grant religion-based exemptions from generally applicable laws is constrained by the Establishment Clause."). By the same logic, other federal laws lifting legal burdens on religious practice would be crippled if not nullified. RLUIPA follows the same legal standard that animates RFRA. *See* 42 U.S.C. § 2000cc(a)(1). Although requiring a state prison to let a Muslim prisoner grow a short beard does not affect anyone else, *Holt*, 135 S. Ct. at 867 (Ginsburg, J., concurring), requiring it to provide kosher food for Jewish inmates may come at the expense of better quality food for the general inmate population. Applying the land use portions of RLUIPA also has detrimental results for local residents who must tolerate the construction of new religious buildings, with accompanying traffic and noise, at the expense of their formerly quiet neighborhoods. The Church Amendment, 42

U.S.C. § 300a-7(c)(1), which entitles physicians with religious or moral objections not to perform abortions, reduces the number of available physicians. Title VII's exemption for religious employers no doubt places third parties at a disadvantage by eliminating a cause of action for employment discrimination. 42 U.S.C. § 2000e-1(a). On the same reasoning, religious exemptions from the Fair Housing Act, 42 U.S.C. § 3607, Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681(3), and the Americans with Disabilities Act, 42 U.S.C. § 12187, would be equally vulnerable.[7]

Taking a scythe to every religious exemption in federal, state, and local law would not be the only consequence of adopting and extending the Government's third-party-harm rule. It would cast doubt on the autonomy of religious organizations to select their own leaders – a proposition that recently commanded the Court's unanimous support. *See Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694 (2012). For if religious freedom must give way whenever it makes a non-claimant worse off, surely a church school has no business dismissing a commissioned minister for threatening to bring a lawsuit. *See id.* at 700.

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[7] Religious exemptions under state law would be subject to the same analysis. *See, e.g.*, Conn. Gen. Stat. § 52-571b (state RFRA); Fla. Stat. § 761.01 (same); 775 Ill. Comp. Stat. 35/1 *et seq.* (same).

Elevating third-party harm as a categorical bar on religious exemptions could reverse the outcomes of all the Court's religious exemption decisions. *Amos* would be questionable because it disregarded the effect on church employees of allowing a religious organization to discriminate among employees based on religion. *Cutter* could not justify placing religion ahead of other values, to the detriment of non-religious inmates. *Walz*'s affirmation of tax-exempt status for churches would founder. *Zorach* could not permit released time for schoolchildren to pursue religious education during the school day, given the possible detriment to other students from the periodic absence of religious pupils. Both *Gillette* and *The Selective Draft Law Cases* would be seen as having prejudiced the uniform application of national conscription; for every conscientious objector, another unwilling soldier had to be enlisted into military service, with the risk of injury or death.

The Government's third-party-harm rule, in short, carries broad and serious implications. Pressed to its logical limit, that rule would overturn venerable provisions of federal law, undermine principles central to the Religion Clauses of the First Amendment long thought to be rare points of consensus, and reverse numerous decisions issued over decades. None of these results can be defended. Religious exemptions like RFRA are consistent with the Establishment Clause. *See Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (The First Amendment "affirmatively mandates accommodation, not merely tolerance, of all religions,

and forbids hostility toward any.") (citations omitted). But they could be rendered worthless if the Government's third-party-harm rule is adopted as a categorical bar on relief under RFRA. Nullifying RFRA and the religious exemptions it resembles would gravely diminish religious freedom and "deny a national heritage with roots in the Revolution itself." *Walz*, 397 U.S. at 673.

CONCLUSION

The judgments of the courts of appeals should be reversed.

Respectfully submitted,

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APPENDIX
INDIVIDUAL STATEMENTS OF INTEREST

The National Association of Evangelicals is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It serves 40 member denominations, representing 45,000 local churches, as well as numerous evangelical associations, organizations, universities, seminaries, social-service providers, and millions of individual Christians. NAE serves as the collective voice of evangelical churches, as well as other church-related and independent religious ministries.

NAE believes that religious freedom makes sense only on the premise that God exists, and that God's character and personal nature are such as to give rise to human duties that are prior and superior in obligation to the commands of civil society. NAE also holds that religious freedom is God-given, and therefore the civil government does not create such freedom but is charged to protect it. It is grateful for the American legal tradition of church-state relations and religious liberty, and believes that this constitutional and jurisprudential history should be honored, nurtured, taught, and maintained.

The Church of Jesus Christ of Latter-day Saints is a Christian denomination with 15 million members worldwide. Religious liberty is a fundamental Church doctrine: "We claim the privilege of worshiping Almighty God according to the dictates of our own conscience, and allow all men the same privilege,

let them worship how, where, or what they may." Article of Faith 11. Accordingly, in coalition with many other faith communities, the Church was significantly involved in drafting and advocating passage of the Religious Freedom Restoration Act. It was also involved, again with many others, in the effort to pass the Religious Liberty Protection Act and in the ultimate passage of the Religious Land Use and Institutionalized Persons Act. Laws like these, with protections for the free exercise of religion, are vital to the Church and its religious mission.

The General Council of the Assemblies of God in the United States of America, also known as the ***Assemblies of God USA*** (AG), is a Pentecostal Christian denomination in the United States founded in 1914. There are 12,897 AG churches in the U.S. with over 3 million members and adherents. It was ranked the seventh largest denomination in the United States in 2013. The AG is associated with sixteen institutions of higher education. The AG is the U.S. member of the World Assemblies of God Fellowship, the world's fourth largest Christian community. There are more than 67 million Assemblies of God members worldwide, making the Assemblies of God the world's largest Pentecostal denomination.

The General Council of the Assemblies of God is deeply concerned that the Government's interpretation of RFRA is unduly narrow and contrary to congressional intent, and substantially threatens the most fundamental religious beliefs of many religious organizations, including many of its affiliated

institutions. The General Council of the Assemblies of God, on behalf of its many churches, schools, and other affiliated institutions, urges the broadest construction of RFRA to ensure that the protection of religious exercise is given the primacy it is accorded by the Bill of Rights.

The Sisters of St. Francis of Perpetual Adoration is a Catholic women's religious community located in Mishawaka, Indiana. We instruct students of all faiths in Catholic institutions at every level, elementary through post-secondary, and the Community sponsors the University of St. Francis in Fort Wayne, Indiana. In healthcare, the Community sponsors Franciscan Alliance, one of the largest Catholic nonprofit health systems in the Midwest. It receives 4 million outpatient visits and 76,000 inpatient admissions annually. Franciscan Alliance has 18,000 employees and is committed to providing service to all, regardless of ability to pay, ethnic background, or religious affiliation. Each year Franciscan Alliance contributes $471 million of community benefits, including charity care, unpaid costs of Medicaid and Medicare, community services, and public programs.

Our hospitals, schools, and other facilities and our service in those and other Catholic institutions are outward manifestations of the prayer and worship central to our lives. Witnessing to the dignity of each human life is intrinsic to our mission of service to all people, and this witness is undermined by laws forcing us to provide access to services that do not uphold the sacredness of all life. That conviction

explains why we have chosen to participate as an *amicus* and why the Franciscan Alliance and University of Saint Francis are parties in a case challenging the same HHS regulations at issue here. *See Diocese of Fort Wayne-South Bend, Inc. v. Burwell*, Nos. 14-1430 & 14-1431 (7th Cir. Sep. 4, 2015).

Colorado Christian University is an evangelical Christian college located in Lakewood Colorado that serves over 6,000 traditional and adult students. The first two of our strategic objectives are: (1) Honor Christ and share the love of Christ on campus and around the world; and (2) Teach students to trust the Bible, lead holy lives, and be evangelists. We firmly believe that religious freedom is the most fundamental right guaranteed by the Bill of Rights and that RFRA was enacted to prevent the kind of government overreaching found in this case.
